

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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UNITED STATES OF AMERICA,  
Plaintiff,  
v.

CASE NO. CR S-96-0350 WBS

MEMORANDUM AND ORDER RE:  
DEFENDANT'S MOTION TO DISMISS  
COUNTS UNDER 18 U.S.C. §  
1956(h)

JOHN THAT LUONG, et al.,  
Defendants.

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Defendant John That Luong is one of seven defendants named in the indictment in this case. Luong now moves to dismiss all money laundering conspiracy counts in his indictment on the grounds that the conduct alleged in those counts constituted an offense under 18 U.S.C. § 371 and not, as charged, under 18 U.S.C. § 1956(h).

I. Factual and Procedural Background

On July 16, 1998, a Grand Jury returned a 72-page indictment charging Luong and six other defendants with, inter alia, 13 Counts of Conspiracy to Launder Monetary Instruments in

1 violation of 18 U.S.C. § 1956(h). The indictment described a  
2 series of transactions, funded by proceeds from a pattern of  
3 racketeering, robberies, and drug transactions, that included:  
4 (1) the purchase of property located at 110 Burwood Way, Folsom,  
5 Ca, (2) the purchase of a swimming pool built on the Burwood Way  
6 property, (3) the purchase of a business, Connie's Drive-Inn, and  
7 (4) the purchase several luxury automobiles. (July 16, 1998  
8 Superseding Indictment Counts 1, 12, 15, 24, 29.)

9 Each count involving Luong and a violation of 18 U.S.C.  
10 § 1956(h) alleges that Luong and others knowingly conspired "to  
11 commit offenses against the United States, specifically:  
12 laundering of monetary instruments, in violation of 18 U.S.C.  
13 Section 1956(a)(1) . . . ." <sup>1</sup> These counts go on to list the  
14 "Overt Acts" taken in furtherance of the conspiracy.

15 Luong contends that the indictment as worded does not  
16 charge him with conduct that constitutes an offense proscribed by  
17 18 U.S.C. § 1956(h). (Def.'s Mot. to Dismiss Money Laundering  
18 Conspiracy Counts 3.) Specifically, he argues that the caption  
19 for each count, identifying the charge as one under 18 U.S.C. §  
20 1956(h), is "mere surplusage" and the language of the charge,  
21 alleging a "conspiracy to commit offenses against the United  
22 States" rather than "conspiracy to commit Section 1956(a)(i)" is  
23 fatally flawed. (Id. at 2.) Additionally, Luong notes that the  
24 inclusion of "Overt Acts" suggests that the general conspiracy  
25 statute, 18 U.S.C. § 371, which carries a lower maximum sentence,

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26  
27 <sup>1</sup> Counts 15, 24, and 29 further specifically allege that  
28 the accused defendants "engag[ed] in monetary transactions in  
property derived from specified unlawful activity--as further  
delineated in [subsequent counts]."

1 is applicable here, rather than the specific money laundering  
2 statute. (Id.) Based on these defects, defendant argues that he  
3 has not been "plainly and unmistakably" charged with conspiracy  
4 to launder money, in violation of his due process rights.

5 II. Discussion

6 An indictment "must be a plain, concise and definite  
7 written statement of the essential facts constituting the offense  
8 charged." Fed. R. Crim. P. 7(c)(1). "Generally, an indictment  
9 is sufficient if it sets forth the elements of the charged  
10 offense so as to ensure the right of the defendant not to be  
11 placed in double jeopardy and to be informed of the offense  
12 charged." United States v. Rodriguez, 360 F.3d 949, 958 (9th  
13 Cir. 2004); see also United States v. Lane, 765 F.2d 1376, 1380  
14 (9th Cir. 1985). Relevant to the counts challenged in this  
15 motion, 18 U.S.C. § 1956(h) prescribes the penalties for any  
16 conspiracy to violate § 1956 or 1957. Id. ("Any person who  
17 conspires to commit any offense defined in this section or  
18 section 1957 shall be subject to the same penalties as those  
19 prescribed for the offense the commission of which was the object  
20 of the conspiracy."). Thus, the indictment here needed only to  
21 inform Luong that he was charged with a conspiracy to violate 18  
22 U.S.C. § 1956 or § 1957.

23 Defendant's argument that the indictment only charges  
24 him generally with "conspiracy to commit offenses against the  
25 United States" is simply wrong. In each count captioned as  
26 falling under 18 U.S.C. 1956(h), the indictment specifies, either  
27 explicitly or by reference to other counts in the indictment, the  
28 particular offense against the United States. The truncated

1 version of the language assailed by defendant does not accurately  
2 represent the contents of the indictment.

3         Likewise, the inclusion of a section identifying overt  
4 acts in each count has no bearing on the validity of the  
5 indictment. The government properly concedes that, pursuant to a  
6 recent Supreme Court decision, "conviction for conspiracy to  
7 commit money laundering, in violation of 18 U.S.C. § 1956(h),  
8 does not require proof of an overt act in furtherance of the  
9 conspiracy." Whitfield v. United States, 543 U.S. 209, 219  
10 (2005). However, "[a]llegations in the indictment that are not  
11 necessary to establish a violation of a statute . . . may be  
12 disregarded if the remaining allegations are sufficient to charge  
13 a crime." United States v. McIntosh, 23 F.3d 1454, 1457 (8th  
14 Cir. 1994), quoted with approval in United States v. Garcia-Paz,  
15 282 F.3d 1212, 1217 (9th Cir. 2002); see also United States v.  
16 Fernandez, 388 F.3d 1199, 1221 (9th Cir. 2004) (holding that  
17 "[t]he district court did not err in refusing to dismiss the  
18 indictment" "because of mere surplusage"). Surplusage is only  
19 fatal when it "has the effect of misleading the defendant as to  
20 the actual offense against which he is defending." United States  
21 v. LeMay, 330 F. Supp. 628, 630 (D. Mont. 1971); see also United  
22 States v. Love, 535 F.2d 1152, 1158 (9th Cir. 1976).

23         The mere inclusion of overt acts in a charge captioned  
24 as one under 18 U.S.C. § 1956(h), alleging conspiracy to launder  
25 monetary instruments, could not possibly lead Luong to think he  
26 was being charged under the general conspiracy statute, 18 U.S.C.  
27 § 371. The language of the indictment is unambiguous regarding  
28 the charge and the conduct supporting it. Moreover, as the

1 government notes, at the time the indictment was drafted, it was  
2 not clear that overt acts could be omitted from an indictment  
3 alleging a violation of 18 U.S.C. § 1956(h). (U.S.A.'s Opp'n to  
4 Def.'s Mot. to Dismiss 8). The grand jury returned its  
5 indictment several years before the Ninth Circuit decided United  
6 States v. Tam, 240 F.3d 797 (2001), which held that "the money  
7 laundering conspiracy statute does not require the indictment to  
8 allege an overt act," id. at 802, and well before the Supreme  
9 Court conclusively resolved the question, Whitfield, 543 U.S. at  
10 219. The indictment, as written, was and is therefore proper.

### 11 III. Conclusion

12 In a previous order addressing another one of Luong's  
13 motions to dismiss counts in the indictment, this court observed  
14 that "[t]he superseding indictment, which is 72 pages long, not  
15 only sets forth each of the elements of the respective charges  
16 but goes into painstaking detail describing the evidentiary facts  
17 supporting each of the charges. If the indictment is subject to  
18 any legitimate criticism it is for being too lengthy and  
19 containing too much detail." (Dec. 11, 2003 Order (addressing  
20 motion to dismiss for failure to state an offense) 5-6.) This  
21 observation still holds true. The grand jury's superceding  
22 indictment contains more than enough detail to appraise Luong of  
23 the money laundering conspiracy charges he must defend against.

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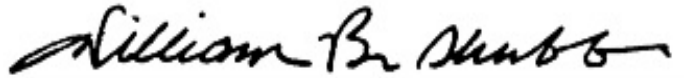
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1 IT IS THEREFORE ORDERED that defendant's motion to  
2 dismiss the money laundering conspiracy charges from the  
3 indictment be, and the same hereby is, DENIED.

4 DATED: January 25, 2006

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6 WILLIAM B. SHUBB  
7 UNITED STATES DISTRICT JUDGE  
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